IN THE SUPREME COURT OF MISSOURI

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SUPREME COURT NO. SC86065

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STATE ex rel. FORD MOTOR COMPANY,
Relator/Defendant,

vs.

THE HONORABLE MICHAEL W. MANNERS, CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT INDEPENDENCE,
Respondent.

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# REPLY BRIEF OF RELATOR FORD MOTOR COMPANY

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Respectfully submitted,

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## REPLY

## I. RESPONDENT FAILS TO ESTABLISH VENUE IS PROPER IN JACKSON COUNTY

### A. Missouri Revised Statute § 508.010(2) Applies.

Both Ford and Respondent agree Missouri's general venue statute (section 508.010) applies in this case since Plaintiffs' Petition names both a corporation and an individual as defendants. The parties differ regarding which subsection of the statute applies; Ford asserts section 508.010(2) applies to this action, while Respondent asserts section 508.010(1) should apply.

Respondent relies on Bartlett, McCormick, Sledge and Kissinger[1] for the proposition that section 508.010(1) should apply to actions involving multiple defendants, even though the language of the statute reads "When *the* defendant is a resident of the state . . . ." (emphasis added). Bartlett and McCormick were decided prior to Kissinger, and Ford has previously asserted that almost every case that has been decided *since* Kissinger has emphasized that when an individual and one or more corporations are sued together, section 508.010(2) applies. Sledge, a Missouri Court of Appeals case which relies on the reasoning of Bartlett and Kissinger, was not submitted

[1] Bartlett v. McQueen, 238 S.W.2d 393 (Mo. banc 1951); State of Missouri to Use of McCormick v. McDougal, 16 Mo. App. 414, 1885 WL 7639 (Mo. App. 1885); Sledge v. Town & Country Tire Centers, Inc., 654 S.W.2d 176 (Mo. Ct. App. 1983); Kissinger v. Allison, 328 S.W.2d 952 (Mo. App. 1959).

to the Missouri Supreme Court for review or consideration. Thus, Ford asserts those cases have been implicitly overruled by subsequent case law which unequivocally states where an individual and corporation are joined, venue is proper only where the cause of action accrued or where any defendant resides. See England v. Koehr, 849 S.W.2d 168, 169 (Mo. Ct. App. 1993) (stating where an "individual and corporation are joined, venue may be obtained only at a 'residence' of one of the defendants (or at the venue of the tort)").

Respondent argues Ford's reasoning is flawed because Ford is assuming subsections (2) and (3) apply to the exclusion of subsection (1). However, case law supports this assumption. See State ex rel. SSM Health Care St. Louis v. Neill, 78 S.W.3d 140, 143 (Mo. banc 2002) (stating "section 508.010(2), the portion of the general venue statute that governs suits against *multiple defendants*, applies when an individual and one or more for-profit corporations are sued together) (emphasis added); Minihan v. Aronson, 165 S.W.2d 404, 407 (Mo. 1942) (discussing the general venue statute and stating "if the action is personal the suit must be instituted in the county of the defendant's residence or the county of the plaintiff's residence when the defendant is found there, *except, of course, when there are several defendants*") (emphasis added)

(overruled on other grounds, State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820, 821 (Mo. 1994)).[2]

Moreover, Respondent's reasoning is similarly based upon a flawed assumption. Respondent is assuming, as stated in his Brief, that in all the cases Ford cites for support, the plaintiff in that case chose to proceed under subsection (2) or (3), and since Plaintiffs in the present case choose to proceed under subsection (1), that section should apply. (Brief on Behalf of Respondent, pp. 22-23.) Respondent does not consider that perhaps the court did not address subsection (1) in those cases because the court did not believe subsection (1) applied. For example, in Dick Proctor Imports, Inc. v. Gaertner, 671 S.W.2d 273 (Mo. banc 1984), the Court was deciding a challenge to venue with a case involving four corporate defendants and one individual defendant. The court began its analysis by stating the corporate venue statute did not apply, due to the presence of the individual defendant. Id. at 274. It went on to state section 508.010 was applicable and immediately proceeded to analyze the case under subsection (3) because

[2] Respondent attempts to distinguish these cases by stating they involve a nonprofit corporation and public carriers, respectively, but fails to explain how this changes the clear language directing that subsection (1) does not apply to cases involving multiple defendants.

there were two non-resident defendants and three resident defendants.[3] Id. at 275. The court did not discuss whether or not plaintiff chose to base venue on subsection (3), but instead, applied the only subsection of the statute applicable to that case.

Similarly, in England, the Court begins with a brief description of the facts which sets out the parties involved: plaintiff, defendant England (an individual Missouri resident) and defendant Heico (a Nevada corporation). England, 849 S.W.2d at 168. Plaintiff filed the lawsuit in St. Louis City, the subject automobile accident occurred in Ste. Genevieve County, and the driver of the other vehicle (for whom defendant England is defendant *ad litem*) was a resident of St. Louis County. Id. The defendants asserted venue was not proper in St. Louis City pursuant to section 508.010. Id. The Court stated the general venue statute applied and provided the language of subsections (2), (3), (4), and (6) in its opinion. Id. at 168-69. The Court did not address either subsection (1) or (5), precisely because neither applied to the facts of that case. Subsection (1) did not apply because there were multiple defendants and subsection (5) did not apply because that subsection only involve cases where a county sheriff is the plaintiff.

The Court ultimately concluded subsections (3) and (6) applied to determine venue in that case, making venue proper in either county where the defendants resided, namely St. Louis County or Ste. Genevieve County. Id. at 169. Respondent

[3] Section 508.010(3) states: "When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides."

wants this Court to believe the court in England did not apply subsection (1) because the plaintiff chose to proceed under one of the four subsections listed above and not under subsection (1). Clearly, that argument defies logic. The England court laid out all of the subsections of the statute that might be applicable before determining that subsections (3) and (6) applied to the facts before it, which involved multiple defendants, one a resident and one a non-resident. The Court could have just as easily included subsection (1) in its analysis, but chose not to. The reason for doing so is clear – the Court did not believe subsection (1) was applicable.

England is also instructive when examining Respondent's argument that a hypothetical factual scenario laid out in McCormick is supportive of his position that subsection (1) should apply to cases involving multiple defendants. To summarize, the McCormick court claims it would be "absurd" if plaintiff A could sue either defendant B or defendant C individually (in two separate lawsuits) in St. Louis City based on one subsection of the statute, but could not sue in St. Louis City if both defendants B and C were included in the same action. However, Missouri cases since McCormick, which was decided in 1885, have disagreed. England is one of those cases. In England, the court explains that if plaintiff had sued only defendant Heico (the corporate defendant), venue in St. Louis City would have been authorized under the corporate venue statute, section 508.040. However, since plaintiff chose to join defendant England (the individual defendant) in the suit as well, venue was not proper in St. Louis City. Although McCormick involved subsections of the same statute and England involved two different statutes, the same rationale applies. The England court contemplated that by

suing two defendants, it may lead to a situation where a plaintiff can no longer sue in a county he or she would have been able to had there been only one defendant. Notwithstanding, the court still held that subsection (3) applied because multiple defendants were involved.

Under section 508.010(2), which applies in the case at bar because there are "several defendants, and they reside in different counties," venue is improper in Jackson County because none of the defendants are residents of Jackson County and the cause of action did not accrue there. See Smith v. Gray, 979 S.W.2d 190, 191 (Mo. banc 1998) ("When individuals and corporations are sued in the same suit, section 508.010(2) governs: 'When there are several defendants, and they reside in different counties, the suit may be brought in any such county.'"); see also State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820, 823 (Mo. banc 1994) (applying section 508.010(2) to action involving individual and corporate defendants); State ex rel. Parks v. Corcoran, 625 S.W.2d 686 (Mo. Ct. App. 1981) ("It has long been held that when one or more corporations are sued along with one or more individuals, section 508.010(2) is applicable and that the county of residence of corporations in such circumstances is the county in which they maintain their registered office."). Plaintiffs failed to plead that either Daniel Baker or Terry Baker are or were residents of Jackson County, Missouri, and, in fact, defendant Baker has asserted the Estate of Terry G. Baker is located in Linn County, Missouri. Defendant Ford is a Delaware corporation with its principal place of business in Dearborn, Michigan. For venue purposes, Ford is a resident of St. Louis

County, Missouri, where its registered agent is located. Thus, venue is improper in Jackson County.

### B. Assuming *Arguendo* Missouri Revised Statute § 508.010(1) was Applicable, its Terms are Not Met in the Present Case.

Assuming *arguendo* section 508.010(1) did apply to this case, Respondent has still not provided any evidence he met the terms of the statute because defendant Ford was not "found" in Jackson County and Plaintiffs did not plead the residency of Megan and Marissa Herring in their Petition.

#### 1. Ford Was Not "Found" in Jackson County.

Ford has asserted service of process on Roger Burnett, an engineer at Ford, is not enough to establish proper service on a corporation. Respondent argues a "general agent" is one whom transacts all business in a particular line, and that such agent has all of the authority over the transaction of such business. (Brief on Behalf of Respondent, p. 28.) Respondent continues to argue Roger Burnett, who has signed a sworn affidavit stating he is not authorized to accept service on Ford's behalf, is the general agent of Ford's "litigation" business. It is worth repeating that, obviously, Ford Motor Company is in the business of manufacturing automobiles and not in the business of litigation. Respondent wants this Court to accept the preposterous notion that any corporation that gets sued is automatically in the "litigation business," and therefore, anyone who testifies on its behalf is its "general agent." This line of thinking would lead to absurd results.

Furthermore, Respondent's description of Design Analysis Engineers and Ford's Automotive Safety Office is completely wrong. Respondent claims Roger

Burnett, employed by Ford as a Design Analysis Engineer ("DAE"), is a "professional in-house litigation consultant and testifier for Ford." (Brief on Behalf of Respondent, p. 29.) In reality, DAE's do a lot more than litigation, including looking at potential defects for the National Highway Traffic and Safety Administration ("NHTSA") investigations. Further, Roger Burnett is a design engineer and not an attorney. Mr. Burnett was in no way involved in the litigation, beyond testifying as a witness called at trial, when he was served with process.

Similarly, Respondent's description of Ford's Automotive Safety Office ("ASO") is completely unsupported by the record and, in fact, false. Contrary to Respondent's contention, the ASO has very little involvement with litigation. Instead, they are involved in all aspects of automotive safety, from product planning to government interaction to regulatory compliance. The ASO's sole function is not "to employ engineers and others whose sole function is to consult on and testify in litigation matters." (Brief on Behalf of Respondent, p. 29.) Moreover, Roger Burnett is not employed by the ASO, and Plaintiffs did not present any argument or evidence to the trial court asserting the contrary. Respondent is raising this issue for the first time in his Brief on Behalf of Respondent to this Court. There was no evidence in the record before Respondent at the time of his ruling regarding the ASO.

Respondent cites to Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. banc 1963), in support of his argument that Roger Burnett is Ford's general agent. In Morrow, the person upon whom process was served regularly sold the defendant's products and was its "exclusive agent," by written contract, for certain Missouri counties.

Further, he listed his home address (also his office) as a "branch office" of the company in the Missouri yellow pages. Hence, the court found him to be a "general agent" of the manufacturer defendant. On the contrary, Roger Burnett has never represented he is an agent of Ford. He was simply testifying as a witness for Ford in an unrelated trial when he was served with process. He has signed two affidavits, under oath, in which he clearly states he is not authorized to accept service on Ford's behalf, he is not an officer or principal of Ford, he had no involvement in the litigation beyond his testimony as an expert witness, and he is not in the "business" of conducting litigation on behalf of Ford.

The case cited by Ford in its Brief, State ex rel. Mutual Insurance Co. v. Rooney, 406 S.W.2d 1 (Mo. banc 1966), was decided after Morrow and discusses that case at length. In Mutual Insurance, an insurance salesman who maintained an office in his residence, lacked authority to issue or sign policies, was paid on a commission basis, and was under contract with the insurer as an "independent contractor" was found not to be a "general agent" of insurer. Id. The facts were similar to those in Morrow, but the court was able to distinguish the cases. The court stated, "In Morrow, service was had upon one [salesman] who was described as a manufacturer's agent. However, he was in *sole charge* of the business of the nonresident corporate defendant in a large part of Missouri." Id. at 4 (emphasis added). The Mutual Insurance court held the salesman in its case did not have the same authority as the salesman in Morrow, and decided he did not fit under the definition of "general agent," which the court believed "may be equivalent to the term 'manager.'" Id. The same is true for Roger Burnett. He is not in "sole charge" of any aspect of Ford's business and is considered a non-managerial

employee; Respondent has set forth no evidence to the contrary. Thus, according to Missouri case law, he is not a "general agent" on which service of process may be made.

Respondent can present no evidence to this Court that Roger Burnett was a "general" agent of Ford. Therefore, Respondent has failed to prove that Roger Burnett is a "general agent" as required by Missouri law.

**2. Respondent Did Not Plead the Residency of Megan and Marissa Herring in Their Petition.**

No evidence, or even an allegation, existed before Respondent at the time of his ruling that Plaintiffs Megan and Marissa Herring resided in Jackson County. Contrary to Respondent's assertion, Ford did, in fact, raise the argument of Plaintiffs' residence in the underlying proceedings before the trial court and not for the first time in the writ proceedings before the Western District Court of Appeals. In Ford's Reply Brief to Plaintiffs' Response Dated April 12, 2004, filed with the trial court on April 21, 2004, Ford raises the issue of Plaintiffs' failure to establish their residence in Jackson County. (A file-stamped copy is attached as Exhibit A.) Therefore, Ford will not address Respondent's argument questioning whether it is proper to present this issue for the first time in the writ proceedings.

In a last-ditch effort to obtain venue in Jackson County, Respondent now claims every count in Plaintiffs' Petition is stated on behalf of all of the Plaintiffs, including Rusty Herring. (Brief on Behalf of Respondent, p. 34.) However, Rusty Herring stated no claim for individual injuries in the Petition. In fact, the Missouri Uniform Accident Report (attached as Exhibit B) reflects that he was not even in the

vehicle at the time of the subject accident. Therefore, Rusty Herring is not the "plaintiff" for purposes of analysis under the statute. See Fischer v. Fischer, 34 S.W.3d 263, 265 (Mo. Ct. App. 2000) (stating "a next friend is not a party to the litigation"). Rather, the "plaintiffs" are the minor children who were alleged to have been injured in the lawsuit, Megan and Marissa Herring. Plaintiffs did not plead the residency of Megan and Marissa Herring in their Petition or in the next friend application. According to the Missouri Uniform Accident Report (Exhibit B) Megan and Marissa Herring were residents of Brookfield, Missouri at the time of the accident, which is not located in Jackson County.

As such, on the information present before Respondent at the time of his decision, Plaintiffs had not properly pled their residency as Jackson County. See State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820, 823 (Mo. 1994) (stating "venue is determined as the case stands when ***brought***, not when a motion challenging venue is decided") (emphasis in original); State ex rel. Private Nursing Service, Inc. v. Romines, 130 S.W.3d 28, 29 (Mo. Ct. App. 2004) (stating "venue is determined at the time an action is brought, or filed").[4] Ford has met any burden of proving improper venue. Plaintiffs did not plead the residency of Megan and Marissa Herring in their Petition, and the Missouri Uniform Accident Report lists their residence as Brookfield, Missouri, to

[4] Respondent now asserts in his Brief that Plaintiffs were residents of Jackson County; however, this attempt is too late. Missouri case law dictates venue is determined as the case stands when brought, not when a motion challenging venue is decided. See Mummert, 870 S.W.2d at 823.

which Respondent has never provided any evidence to the contrary. Ford properly raised this issue at the trial court level, so Plaintiffs did have an opportunity to address this issue with additional evidence, which they chose not to do. Accepting the available information to Respondent, at the time of his ruling, that Megan and Marissa Herring were not residents of Jackson County, Respondent's argument that section 508.010(1) applies must fail.

Based on the above, even if section 508.010(1) did apply to the case at bar, none of the elements of that subsection were present in the record before Respondent, as defendant Ford was not "found" in Jackson County and Plaintiffs did not establish their residence in Jackson County. Thus, venue in Jackson County is improper.

## II. RESPONDENT FAILS TO PRESENT ANY EVIDENCE DISPUTING FORD'S POINT RELIED ON NO. 2.

Respondent does not address Ford's argument in Point Relied On No. 2, other than stating the trial court could not find any applicable precedent regarding the effect of one defendant's waiver of venue upon a co-defendant. Ford relies on the argument and authorities stated in its Brief, and assumes Respondent has abandoned any argument regarding this issue.

Respondent does, however, make a policy argument for retaining the entire action in a single venue. Respondent cites the advantages against splitting a single cause of action, but fails to take into account the primary purpose of the venue statute, which is to provide a "convenient, logical, and orderly forum" for litigation. State ex rel. Reedcraft Mfg., Inc. v. Kays, 967 S.W.2d 703, 704 (Mo. Ct. App. 1998); State ex rel.

Quest Communications Corp. v. Baldridge, 913 S.W.2d 366, 369 (Mo. Ct. App. 1996). Allowing Respondent to select a forum in which neither defendant resides, nor where the accident occurred, frustrates this purpose.

In addition, allowing Plaintiffs' attorney to select a next friend and base venue on the residence of the next friend instead of the actual persons whose interests are at issue encourages forum shopping and defeats the intent of the Missouri venue rules of providing certainty where a defendant can be sued. In fact, such a proposition is inapposite to the purpose of the general venue statute, which is "protecting the resident individual defendant from the indefiniteness of knowing whether venue as to him was proper." England, 849 S.W.2d at 169. The same is true with respect to Respondent's argument that a witness in a trial testifying as a corporate representative can be held to be a "general agent." Allowing a plaintiff to track down and serve a witness in a trial provides plaintiff with venue options which are "indefinite" to the defendants. It would also discourage corporate witnesses from testifying live at trial if they had to be aware of process servers lined up outside the courtroom doors attempting to serve them with process in other cases. Such a scenario was certainly not the purpose of the legislature in drafting the venue statutes.

## CONCLUSION

Plaintiffs filed suit against two defendants, a corporation and an individual. Venue is not proper in Jackson County under section 508.010(2), the section governing cases with multiple defendants, because the cause of action did not accrue in Jackson County and neither defendant resides there. Even if Respondent were correct in applying

section 508.010(1), the terms of the statute were not met because Ford was not "found" in Jackson County via Plaintiffs' service of non-managerial employee Roger Burnett, and there is no evidence or allegation in the record that Plaintiffs Megan and Marissa Herring were residents of Jackson County. Further, defendant Baker's waiver of improper venue does not bind Ford to improper venue in Jackson County. Thus, Ford respectfully requests this Court issue a Writ of Prohibition preventing Respondent from taking further action on this matter other than dismissing the action or transferring it to a county where venue is proper.

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## RULE 84.06(C) CERTIFICATION

Pursuant to Mo. R. Civ. P. 84.06(c), the undersigned hereby certifies that: (1) this brief includes the information required by Rule 55.03; (2) this brief complies with the limitations contained in Rule 84.06(b); and (3) this brief contains 4,252 words, as calculated by the Microsoft Word software used to prepare this brief.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing (plus one copy on a floppy disk that Relator hereby certifies was scanned for viruses and is virus free) were mailed, postage prepaid, this 2nd day of December, 2004, to:

The Honorable Michael W. Manners
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# APPENDIX TO REPLY BRIEF OF RELATOR FORD MOTOR COMPANY

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